IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 87

BOB WHITE, *Appellant*,
v.
STATE OF TEXAS, *Appellee*

Appealed From the Court of Criminal Appeals of the State of Texas, Austin, Texas

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BRIEF FOR APPELLANT

J. P. ROGERS,
S. F. HILL,
Attorney for Appellant
Houston, Texas

CARTER W. WESLEY,
Of Counsel

GILLESPIE-ALPHA CO., HOUSTON

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Preliminary Statement

Appellant, Bob White, a negro, was indicted at a special August Term, 1937, of the District Court of Polk County, Texas, charged with the offense of rape on Ruby Cochran (an adult, a white woman).

At the time this indictment was returned by the special

grand jury in Polk County, Texas, the regular District Court for the Ninth Judicial District was then in session at Conroe, Texas, both being held in the same district at the same time by the same district judge.

Art. 1920, VERNON'S ANNOTATED CIVIL STATUTES, provides for holding special terms of our district courts. It is obvious that the same court cannot be in session at the same time in two different counties, and this Court does not know when the regular terms of the Ninth Judicial District Court are held in the several counties composing that district. Art. 199, Section 17, Subdivision 9 thereof, provides in substance that the Ninth Judicial District Court shall be held in Polk County on the first Monday in January and July of each year, and may remain in session three weeks, and such court shall be held in Montgomery County on the eighteenth Monday after the first Monday in January and July of each year, and may remain in session six weeks; and on the third Monday after the first Monday in January and July, each year, and may remain in session six weeks. It is, therefore, obvious that the Ninth Judicial District Court was in session in Montgomery County at the time the transcript indicates this special term of the court for Polk County was called, unless this special term of the court in Montgomery County had temporarily adjourned. We submit that no order can be shown in this record, showing the temporary adjournment of said District Court at said time for Montgomery County, —WILSON v. STATE, 223 S.W. 217.

Again, a special term of our district courts may be called for general purposes, or for any specific purpose. If a special term of the Ninth Judicial District Court for Polk County was called because of unfinished business, and defendant being indicted at said term, we doubt if the court had such power, because the order calling the same limited the scope of its

business. On termination of special term, see STEPHENSON v. NICHOLS (Com. App.), 286 S.W. 197. On temporary adjournment of one court to call a special term of another, see WILSON v. STATE, 223 S.W. 217. On matters which may be considered at special term, see CHANT v. STATE, 166 S.W. 513; EX PARTE HOLLAND, 238 S.W. 654; STEPHENS v. STATE, 245 S.W. 687.

This case was transferred to the District Court of Montgomery County at Conroe, Texas, and on the 5th day of August, 1938, this case was called for trial and afterward the jury (composed of white men exclusively) brought into the court the following verdict, which was received by the court and entered upon the minutes of the court, as follows, to wit: "We the jury find the defendant, Bob White, guilty as charged in the indictment and assess his punishment at death."

The motion for new trial was filed on August 5, 1938, and was later overruled by the court, to which action of the court defendant by counsel then and there in open court excepted and gave notice of appeal to the Court of Criminal Appeals of the State of Texas.

Defendant was given thirty days in which to file Bills of Exception and Statement of Facts.

The Statement of Facts and Bills of Exception were filed in due time and for the reasons hereinafter set out in this brief, it is pointed out to this Honorable Court, where the trial court was in error in overruling defendant's motion for a new trial and for errors herein pointed out it is the contention of the appellant that this case should be reversed and cause remanded.

Appellant's First Assignment of Error

The court erred fundamentally in overruling appellant's motion to quash the indictment in this case and also to quash the special venire. *The Jury Commissioners* in selecting the Grand Jury of Polk County where defendant was indicted failed and refused to select any member of the colored race as members of the Grand Jury, and further that the Jury Commissioners failed and refused to select any member of the colored race on the Special Venire drawn in Montgomery County, Texas, where said cause was tried. That this was purposely done and in support of the appellant's contention it will be shown by the Statement of Facts on motion for new trial in this cause on page 3 of said Statement of Facts, W. H. Freeman, a member of the Jury Commission, who drew the Grand Jury that indicted Bob White, testified (S.F. p. 3): "As a member of that Jury Commission I did not select any negroes as members of the Grand Jury to try Bob White. We took the men as we came to them and tried to get as good men as we could to serve in this case. I know that there are negroes in that county who were freeholders and householders; quite a number of them. We did not discuss the negroes to serve as veniremen. We took men that we thought were qualified to serve on the Grand Jury and venire in the case. These men who served as Grand Jurors in that case were men that had lived in the county over a long period of years. They were men with good reputations in the county where they lived."

Authorities

We would respectfully submit to this Honorable Court for its consideration that the defendant has

not had a fair and impartial trial as guaranteed him under the Constitution of the United States. That in support of our contention that no negro being drawn on the Grand Jury, and that this was purposely done as is shown by the record in this cause which reflects the fact that not only in the trial of this case, but for some time prior thereto no negroes have served on either the Grand Jury venire or Petit Jury in Polk County, Texas.

Appellant's Second Assignment of Error

The court erred in permitting the State to offer in evidence the purported written confession of the defendant, Bob White.

Counsel for appellant objected to the introduction of this confession because it was not a voluntary confession and was made under duress. That the defendant could not read or write and did not understand what he was signing if he did sign said statement.

The record in this case reflects the facts that at the time said confession was made appellant was in jail at Beaumont, Texas; that officers were present at the time, some of whom had just prior to this taken the defendant out of jail and into the woods. Defendant testified that these same officers chained him to a tree and gave him a severe beating and threatened to kill him unless he made a confession.

That said confession was dictated by Mr. Foreman, a special prosecutor in this case, and was written by Ernest Coker, County Attorney of Polk County, Texas, who were highly prejudiced against this defendant and seeking his conviction. That this defendant is an ignorant negro and can neither read or write and this instrument shows clearly that he did

not and could not have possibly dictated the same. (Saved by Bill of Exceptions No. 3, Tr. pp. 49, 50 and 51, and made a ground for new trial.)

The undisputed facts as disclosed by the records in this case show that while appellant was incarcerated in the jail in Polk County, Texas, that he was taken to the woods by officers and rangers on numerous occasions. The appellant, Bob White, testified (S.F. p. 96), "I remained in jail over and about seven or eight days and during that seven or eight days I was taken out of that jail four nights straight. While I was out in the woods there, them rangers whipped me. Every time they taken me out they whipped me and every time they carried me back to the jail they told me I better not tell it. They took me to Beaumont about three or four days after they got through with whipping me."

This purported confession shows on its face that it could not have been dictated by the appellant who was an ignorant negro who can neither read or write.

There was no other evidence in this case tending to show appellant's guilt except by the remotest of circumstantial evidence and the admission of this confession was done over the objection of counsel for the appellant.

There is no identification of the defendant as the person who committed the offense other than that contained in said purported statement, which statement was obtained after at least one week of mental and physical coercion and fraudulent persuasion in a strange community under the influence of the presence of the officers who testified that they had taken the defendant from jail during the period in between the time of his arrest and the time of making his confession, and at such times had taken him down the road

and off the road and into the woods so many times the number thereof could not be remembered, and in this connection the prosecutrix did not in the slightest manner identify the defendant.

The State relied for a conviction solely on the confession of this defendant which was not a voluntary confession, does not meet the requirements of the statutes, was made in a strange place under coercion and persuasion, and should not have been admitted, especially because of the aforesaid reasons.

Appellant's Third Assignment of Error

The court erred in permitting the following proceedings to be had during the trial of said cause. While the defendant was on the witness stand there were several remarks made by counsel for the State and also of the court as follows: Mr. Campbell: "We want to know who 'they' are." Mr. Foreman: "It might have been John D. Rockefeller." The Court: "I will ask you to prove who 'they' were." Mr. Pitts: "I said it was the Texas Rangers."

These remarks were made in the presence and hearing of the jury. Timely objections were made to the same as is shown by the Bills of Exception. (No. 4, Tr. p. 52.)

Appellant's Fourth Assignment of Error

Private Prosecutor Z. L. Foreman in his argument to the jury made this statement: **"It does not make any difference to Mr. Johnson and Mr. Rogers what happened to Mrs. Cockran. As far as they are concerned their innocent negro should be turned loose."**

These remarks involving defense counsel were highly in-

flammatory and not borne out by the record and to which timely objection was made. (Saved by Bill of Exception and made ground for new trial, Tr. p. 28.)

Z. L. Foreman in his argument in this case at another time used this language: "I do not believe Ernest Coker would have thought of it. I do not believe Appling would have thought of it. I do not know I would have thought of it."

This and other remarks of counsel were objected to because counsel was entirely outside the record and although admonished by the court to stay in the record, the harm had already been done.

Appellant's Fifth Assignment of Error

Z. L. Foreman, private prosecutor, in his argument before the jury, used this language: "I have seen Holiday (referring to Polk County sheriff) in lots of situations where I thought he would never work it out, but he did work out of it. I have never seen a sheriff with as much perseverance and willing to go at any time and help the solution of crime in any jurisdiction he has been there. HE HAS NEVER HAD ONE YET HE DID NOT SOLVE. I happened to know about him for I worked with him for ten straight years."

Regardless of the admonitions from the court Mr. Foreman persists in arguing facts not brought out by the evidence. We submit the foregoing remarks are clearly outside the record and counsel as giving evidence to the jury of facts not testified to by any witness, and while the court instructed the jury not to consider these remarks, counsel had already testified to facts not heretofore disclosed by the evidence and a fact that was very material in that this case was based

entirely on circumstantial evidence except the purported confession of Bob White.

This Honorable Court many times has had to pass on this same question of State's counsel testifying before the jury without being sworn and in the case of ESTANCHEL v. STATE, 231 S.W. 120, this same question was passed on. That case was one in which the defense was an alibi, the defendant claiming to have been at home and asleep at the time the offense was committed. His father was subpœnaed as a witness in his behalf and although in his behalf and although in attendance in court, was not used as a witness. In the argument the District Attorney stated to the jury that defendant's father was not put on the stand because he had told the arresting officer before he knew his son was arrested that defendant did not get home until 10 o'clock on the night of the robbery and because he was already "sewed up." In this case the trial judge reprimanded counsel and instructed the jury not to consider this argument. This Court held that this was a damaging statement against appellant and we can not hold the same to have been harmless in view of the penalty inflicted.

In the case of HAGGARD v. STATE, 269 S.W. 403, counsel for the State used this language: "Gentlemen of the Jury: Who is the defendant's witness? Dr. Goolsby. I know him and have no confidence in his testimony. I have had many cases in this district for the State and I always find said witness testifying for the defendant."

The jury was instructed to disregard these remarks. In this case the court laid down this rule: The unsworn statement of the State's counsel to the jury of a material fact adverse to defendant which was not put in evidence during the trial will require the judgment of conviction to be set aside.

In the case of BRISTER v. STATE, 262 S.W. 82, the District Attorney used this language: "That in his oath he believed defendant guilty and that the jury would not be doing their duty in upholding their offices if they did not convict him." In this case it was held that this was such error that although there was an instruction not to consider the same, this could not remove the injurious effect.

We submit that this case is in line with the one at bar. This statement of Private Prosecutor Z. L. Foreman about the efficiency of the sheriff, Holiday, in always solving every case was a statement very damaging to the appellant, Bob White. Sheriff Holiday was a witness in this case and the statement made by counsel was of such harmful nature that should require reversal of this case alone if there was no other error in the record. Considering the fact that appellant was given the extreme penalty of the law and that the statement made by counsel to a material fact not borne out by the evidence should require reversal.

Respectfully submitted,

J. P. ROGERS,
S. F. HILL,
Attorney for Appellant
Houston, Texas

CARTER W. WESLEY,
Of Counsel